Filed 6/12/09 Murphy & Maconachy v. Preferred Bank CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MURPHY & MACONACHY, INC., et al., Plaintiffs and Appellants, v. PREFERRED BANK, Defendant and Respondent.	B206784 (Los Angeles County Super. Ct. No. BC347718)

APPEAL from a judgment of the Superior Court of Los Angeles County. Malcolm H. Mackey, Judge. Affirmed.

Genga & Associates, John M. Genga, Don C. Moody and Jerl B. Leutz for Plaintiffs and Appellants.

Niddrie, Fish & Buchanan and Martin N. Buchanan for Defendant and Respondent.

Plaintiffs Murphy & Maconachy, Inc. ("MMI") and Norman D. James sued Preferred Bank (the "Bank") after the Bank deposited a check with forged endorsements into the client trust account of its depositor, Girardi & Keese. The Bank successfully demurred, and plaintiffs appeal. We determine that plaintiffs' sole remedy for defendant's payment of a check over an improper endorsement is a claim for conversion under the California Uniform Commercial section 3420. Because the statute of limitations on such a claim expired before plaintiffs brought suit, the demurrer was well taken. Consequently, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Attorney James represented Helena Kallianiotes and others in a 1999 lawsuit brought against Bank of America based on investment fraud. Kallianiotes signed a retainer agreement pursuant to which James was to receive 17.5 percent of any settlement reached, or 22.5 percent of any damages awarded. She signed a separate agreement with MMI to perform investigative work to expose Bank of America's fraud. The retainer agreement between Kallianiotes and MMI fixed the latter's compensation at 17.5 percent of any recovery obtained prior to commencement of trial, and 22.5 percent of any recovery obtained afterwards.

In 2000, as the trial neared and settlement negotiations were underway, Kallianiotes retained Girardi & Keese ("G&K") as co-counsel to finalize the settlement and to serve as lead trial counsel if necessary. James and MMI agreed to reduce their respective contingency fees to 15 percent, so that Kallianiotes could pay G&K a 15 percent contingency fee.

The lawsuit settled at mediation in January 2001, and on or about February 1, 2001, Bank of America delivered checks totaling $5.9 million to G&K in full satisfaction

[1] Pursuant to Evidence Code section 452, subdivision (d), we grant plaintiffs' request that we take judicial notice of the trial court's tentative ruling on the Bank's demurrer to plaintiffs' second amended complaint.

of its settlement obligations. Among these checks was one in the amount of $5.65 million payable jointly to G&K, Kallianiotes and James, which G&K deposited into its client trust account.

Thomas Girardi, Kallianiotes and MMI's Drew Maconachy met in April 2001 to discuss distribution of the settlement proceeds. Girardi drafted, and Kallianiotes signed, a "Consent to Settle and Authorization to Make Disbursements," which authorized and directed G&K to disburse equally among itself, James and MMI a total of $2,360,000 representing 40 percent of the gross settlement. Thus, each of G&K, James and MMI were to receive $786,666.67, of the settlement proceeds.[2]

MMI received $400,000 of its contingency fee at that April 12, 2001 meeting; James received $350,000 of his fee shortly thereafter. The following month, G&K distributed an additional $175,000 to each of James and MMI, after which a remaining $261,667 was due James, and $211,667 was due MMI, from the settlement funds held by G&K.

G&K paid Kallianiotes the final monies due her from the settlement proceeds over three years later, in January 2005. In February 2005, plaintiffs demanded that G&K release the final payments due them pursuant to Kallianiotes's disbursement instructions. G&K refused to make these final payments and threatened to sue plaintiffs for the losses it sustained on account of their "interference." In February 2006, James filed suit against G&K and the Bank; MMI later joined in the lawsuit, in August 2006.

The complaint initially alleged causes of action against G&K for breach of contract, conversion, breach of fiduciary duty, fraud, constructive fraud and negligence, and against both G&K and the Bank for negligence per se, conspiracy and unfair competition. G&K and the Bank filed separate demurrers. The trial court sustained without leave to amend the causes of action against G&K for breach of fiduciary duty, fraud, constructive fraud, negligence, conspiracy and unfair competition, and granted

[2] This represented a slight reduction, to 13.33 percent, of the 15 percent which Kallianiotes had agreed to compensate each of G&K, James and MMI.

leave to amend the claims for breach of contract, conversion and negligence per se. The court deemed the Bank's demurrer moot in light of its ruling on G&K's demurrer.

Plaintiffs filed a second amended complaint, to which G&K and the Bank filed their respective demurrers. G&K's demurrer was sustained as to each cause of action with leave to amend. The Bank's demurrer, based on the statute of limitations, was overruled.

In their third amended complaint, plaintiffs alleged causes of action against G&K for breach of contract (specifically, the plaintiffs' respective retainer agreements with Kallianiotes and the revised retainer agreement which included G&K), quantum meruit, restitution, fraud, and an accounting, and against both G&K and the Bank for conversion, negligence per se, and unfair competition. G&K filed its demurrer, which the trial court sustained without leave to amend as to all causes of action except those for quantum meruit and an accounting.

The Bank then filed its own demurrer with respect to the three causes of action alleged against it in the third amended complaint: conversion, negligence per se and unfair competition. Plaintiffs inform us in their brief on appeal that "Because the court had sustained the G&K demurrer without leave to amend as to all causes of action except for quantum meruit and an accounting, and because the Bank's liability was largely dependent upon [G&K's] liability," plaintiffs did not oppose the Bank's demurrer, but "reserved its claims against [the Bank] to be brought on this present appeal." The trial court sustained the Bank's demurrer without leave to amend and entered an order of dismissal. This appeal followed.[3]

[3] In the meantime, the trial court granted G&K's subsequent motion for judgment on the pleadings. Plaintiffs appealed that ruling. Plaintiffs and G&K have since settled their lawsuit, and the appeal has been dismissed.

DISCUSSION

On appeal from an order dismissing an action after the sustaining of a demurrer, we independently review the pleading to determine whether the facts alleged state a cause of action under any possible legal theory. (*McCall v. PacifiCare of California, Inc.* (2001) 25 Cal.4th 412, 415; *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) We give the complaint a reasonable interpretation, "treat[ing] the demurrer as admitting all material facts properly pleaded," but do not "assume the truth of contentions, deductions or conclusions of law." (*Aubry v. Tri-City Hospital Dist., supra,* at p. 967; accord, *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) We liberally construe the pleading with a view to substantial justice between the parties. (Code Civ. Proc., § 452; *Kotlar v. Hartford Fire Ins. Co.* (2000) 83 Cal.App.4th 1116, 1120.)

"'Where the complaint is defective, "[i]n the furtherance of justice great liberality should be exercised in permitting a plaintiff to amend his [or her] complaint."'" (*Aubry v. Tri-City Hospital Dist., supra,* 2 Cal.4th at pp. 970-971.) Leave to amend may be granted on appeal even in the absence of a request by the plaintiff to amend the complaint. (*Id.* at p. 971; see Code Civ. Proc., § 472c, subd. (a).) We determine whether the plaintiff has shown "in what manner he [or she] can amend [the] complaint and how that amendment will change the legal effect of [the] pleading." (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) "[L]eave to amend should *not* be granted where . . . amendment would be futile." (*Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 685; see generally *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 373-374.)

The crux of plaintiffs' claim against the Bank is that the Bank deposited into G&K's trust account a check payable to G&K, James and Kallianiotes which contained the forged indorsements of the latter two payees. The Bank contends that Division 3 of the California Uniform Commercial Code (the California UCC) has displaced the other causes of action. We agree with the Bank that the California UCC has fully occupied the field concerning the consequences of accepting a check containing forged indorsements,

and thus displaces the common law causes of action upon which this lawsuit is based. Consequently, the Bank's demurrer was properly sustained.

Section 3420, subdivision (a) of the California UCC provides in pertinent part: "The law applicable to conversion of personal property applies to instruments. An instrument is also converted if . . . a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment." The comment to Section 3-420 of the Uniform Commercial Code states: "This covers cases in which a depositary or payor bank takes an instrument bearing a forged indorsement. It also covers cases in which an instrument is payable to two persons and the two persons are not alternative payees, e.g., a check payable to John and Jane Doe. Under Section 3-110(d) the check can be negotiated or enforced only by both persons acting jointly." Because the Legislature adopted this provision of the UCC "exactly as written, this Code Comment is persuasive in interpreting the statute." (*Zengen, Inc. v. Comerica Bank* (2007) 41 Cal.4th 239, 252.)

Thus, section 3420 provides a statutory remedy for a bank's improper deposit of a check without the authorized endorsement of all required payees. "If one co-payee indorses the check and the other does not, the indorsement is not effective, and the depository bank is liable to the nonindorsing co-payee for conversion of the check if he did not consent to the transaction." (*Gil v. Bank of America, Nat. Ass'n* (2006) 138 Cal.App.4th 1371, 1377, fn. 4.) Moreover, Article 3 of the UCC "provides a comprehensive framework for allocating losses when a check bearing a fraudulent indorsement is paid or taken for collection." (*AmerUS Life Ins. Co. v. Bank of America, N.A.* (2006) 143 Cal.App.4th 631, 643.) Because the UCC "'articulates a loss distribution scheme that applies to'" the fact pattern alleged in plaintiffs' complaint, it displaces any other provision of law, including plaintiffs' common law claim for negligence per se. (*Stenseth v. Wells Fargo Bank* (1995) 41 Cal.App.4th 457, 466, quoting *Sun 'N Sand, Inc. v. United California Bank* (1978) 21 Cal.3d 671, 696; see also *Gil v. Bank of America, Nat. Ass'n, supra,* 138 Cal.App.4th at p. 1378 ["it is true, as appellants state, that a collecting bank which cashes a check on the unauthorized indorsement of the payee

is liable to the payee; but it is through an action in conversion, not negligence"].) The fact that plaintiffs allege that the Bank's employee accepted the check with knowledge of the forged indorsements does not change the outcome; a bank is strictly liable to the payee of a check bearing a forged indorsement, without regard to fault. (*Gil v. Bank of America, Nat. Ass'n, supra,* 138 Cal.App.4th at p. 1378.)

Bank of America issued the check in question on February 1, 2001 (a copy of the check was attached to the complaint); proceeds from the check were first distributed to plaintiffs and Kallianiotes on April 12, 2001, after G&K deposited the check in its trust account. Thus, the Bank's alleged conversion of the check occurred no later than April 12, 2001. California UCC section 3118, subdivision (g) provides that actions for conversion of an instrument "shall be commenced within three years after the cause of action accrues." A cause of action for conversion of a negotiable instrument accrues under the California UCC at the time the instrument is negotiated. (*AmerUS Life Ins. Co. v. Bank of America, N.A., supra,* 143 Cal.App.4th at pp. 640-643.) The delayed discovery rule does not apply to claims for conversion of instruments "'except where the defendant invoking the statute of limitations engaged in fraudulent concealment.'" (*Id.* at p. 640.)

Plaintiffs assert that the complaint adequately alleges the Bank's fraudulent concealment of the conversion claim. However, the only allegations of fraudulent concealment concern G&K's conduct, not the Bank's. There is no allegation that the Bank did anything to conceal the existence of the cause of action, or conspired with G&K to conceal the deposit of the check into the latter's client trust account. To the contrary, the complaint alleges that G&K informed plaintiffs that the settlement had been paid, and distributed a portion of the settlement funds to them and to their mutual client, Kallianiotes, in April and May 2001. Plaintiffs did not complain to Bank of America that they had not been made payee of the settlement proceeds, nor to G&K that the settlement funds resided in G&K's client trust account. Rather, plaintiffs willingly acceded to these circumstances. Because the complaint does not allege any acts of fraudulent concealment by the Bank, the statute of limitations expired three years after the check was negotiated,

in the spring of 2001. This lawsuit was filed in February 2006, well after the expiration of the statute of limitations.

In sum, plaintiffs' sole remedy against the Bank for the Bank's conduct as alleged in the complaint is an action for conversion pursuant to California UCC section 3420. Because the statute of limitations for such a claim expired many months before this lawsuit was filed, the trial court properly sustained the Bank's demurrer.[4]

DISPOSITION

The judgment is affirmed.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

KRIEGLER, J.

[4] The Bank filed a supplemental brief in which it argues that the trial court judgment in plaintiffs' lawsuit against Girardi and Keese must be given collateral estoppel effect in this case. Given our affirmance of the trial court's dismissal of the Bank, we need not address this issue of collateral estoppel.